

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

DOMINIQUE SIMONS v. STATE OF TENNESSEE

**Circuit Court for Montgomery County
No. 40800701**

No. M2013-01663-CCA-R3-PC - Filed March 31, 2014

The Appellant appeals the trial court's summary dismissal of his motion to withdraw his guilty plea. The ruling of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court Affirmed Pursuant to Rule 20, Rules of the Court of Criminal Appeals

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and JEFFREY S. BIVINS, JJ. joined.

Dominique Simons, pro se.

Robert E. Cooper, Jr., Attorney General & Reporter; Rachel Harmon, Assistant Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

The Appellant is appealing the trial court's order denying his motion to vacate his guilty plea. The record and the Appellant's brief have been filed. Currently before the Court is the State's motion to dismiss for lack of jurisdiction. The Appellant has not responded to the motion, and the time for doing so is now expired. *See* Tenn. R. App. P. 22(a).

On March 22, 2010, the Appellant pled guilty to unlawful possession of a controlled substance with intent to sell. The Appellant was sentenced to eight years, but he was to be placed on probation after service of one year in confinement. The record reflects that two probation violation warrants subsequently issued. It does not appear any hearings have been

held on those two warrants, as the Appellant appears to be in federal custody. The Appellant filed a petition for post-conviction relief on March 17, 2011. He filed a pro se amended petition on September 5, 2012. The Appellant subsequently inquired about the status of his petition. The trial court clerk informed him that, because he was in federal custody, he could not be transported to the trial court for an evidentiary hearing. Although the Appellant received appointed counsel for the plea hearing, it does not appear the trial court appointed counsel to assist the Appellant in post-conviction. On May 23, 2013, the Appellant filed a “motion to vacate plea and dismiss conviction.” That motion was summarily dismissed by the trial court on June 10, 2013. The Appellant subsequently filed a motion for reconsideration on July 10, 2013, which was denied on July 15, 2013. According to the record, it appears the Appellant’s post-conviction petition is still pending. In its July 15th order, the trial court stated that it “is unaware of any procedure to transfer a prisoner from federal custody to state custody for a hearing on a post-conviction petition or probation violation warrant” but suggested that it “could hear a post-conviction petition by telephone or other electronic device.” Contrary to the State’s assertion, though, that order did not summarily dismiss the post-conviction petition.

The State contends that this appeal is not properly before the Court under Rule of Appellate Procedure 3. The State also asserts that the appeal should otherwise be dismissed because of an inadequate record and adversarial brief. The Appellant is seeking review of the trial court’s decision to deny his motion to vacate his guilty plea. A defendant may move to withdraw a guilty plea pursuant to Rule of Criminal Procedure 32(f). Similarly, a defendant has the right to appeal an order denying a motion of that nature. *See, e.g., State v. Antonio Demonte Lyons*, No. 01C01-9508-CR-00263, 1997 WL 469501 (Tenn. Crim. App., Aug. 15, 1997) (discussing ways a defendant can withdraw a guilty plea). The State suggests that the Appellant is actually appealing the trial court’s order in response to his motion to reconsider. According to its argument, there is no right of appeal from an order denying a motion to reconsider. The trial court issued two separate orders, each one denying the Appellant’s ultimate request to set aside his guilty plea. The notice of appeal signed by the Appellant on July 8, 2013, was stamped “filed” by the trial court clerk on July 10, 2013. Even though the notice states that the Appellant intended to appeal if the trial court denied his motion to reconsider, the notice was timely filed in response to the trial court’s first order of June 10, 2013. *See Tenn. R. App. P. 20(g)* (discussing filings by prisoners). There is not another notice of appeal on file reflecting a date subsequent to the trial court’s second order of July 15, 2013. Nevertheless, for the purposes of this appeal, the Court will consider the notice of appeal as being appropriately filed by the Appellant in order to pursue appellate review of the trial court’s decision to deny his motion to vacate his guilty plea. *See Tenn. R. App. P. 4(a)* (noting that notice of appeal document not jurisdictional in criminal cases).

That being said, the Court hereby affirms the order of the trial court to the extent that it denied the Appellant's request to withdraw his guilty plea. The Appellant's motion to vacate his guilty plea was not timely filed. Rule 32(f) only permits the trial court to consider a motion of that nature prior to the entry of final judgment. As the judgment became final in the Appellant's case well over three years prior to the filing of the motion to vacate the plea, the trial court was without authority to grant relief and thus properly denied the motion without a hearing.

“Once judgment has been entered, the only avenue available to a defendant seeking to withdraw a plea is a collateral proceeding under the Post-Conviction Procedure Act.” *See State v. Burris*, 40 S.W.3d 520, 524 (Tenn. Crim. App. 2000) (citing *Lyons*, 1997 WL 469501). Prior to filing his motion to vacate his guilty plea in 2013, the Appellant appears to have timely filed a post-conviction petition in 2011 challenging the constitutionality of his guilty plea. *See* Tenn. Code Ann. § 40-30-102. It appears that petition is still pending in the trial court. As noted above, the trial court appears to be under the impression that further proceedings cannot occur until the Appellant is transported back to Tennessee from federal custody. That is not altogether accurate. The Post-Conviction Procedure Act provides that an evidentiary hearing can occur when a petitioner is incarcerated out of state, “in which case the trial judge may permit the introduction of an affidavit or deposition of the petitioner.” Tenn. Code. Ann. § 40-30-110(a). Accordingly, the trial court need not necessarily conduct a hearing “by telephone or other electronic device,” as suggested.

For these reasons, the order of the trial court denying the Appellant's motion to vacate his guilty plea is hereby affirmed pursuant to Rule 20. The State's motion to dismiss is therefore denied. The matter is remanded for further proceedings on the Appellant's post-conviction, if necessary.

ROBERT W. WEDEMEYER, JUDGE